

EDWARD J. LAZZERINI

*

NO. 2002-C-0620

VERSUS

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COURT OF APPEAL

**BOARD OF SUPERVISORS
FOR THE LOUISIANA STATE
UNIVERSITY AND
AGRICULTURAL AND
MECHANICAL COLLEGE, ET
AL**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON SUPERVISORY WRIT DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-1449, DIVISION "N"
HONORABLE ETHEL SIMMS JULIEN, JUDGE

JUDGE MICHAEL E. KIRBY

(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer, Judge Michael E. Kirby)

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STATEMENT OF THE CASE

Relators seek review from the denial of a motion for partial summary judgment.

Respondent is a professor at the University of New Orleans. He filed this action against his employer and several individual defendants alleging three causes of action:

1. Retaliation in violation of his constitutional right to freedom of expression;
2. Tortious interference with contract;
3. Intentional infliction of emotional distress.

Essentially, respondent contends that relators entered into a specific campaign of retaliation in response to respondent having brought allegations of impropriety against another professor at the university. Relators filed a motion for partial summary judgment seeking among other things dismissal of respondent's tortious interference with contract claim.

The tortious interference with contract claim concerns two grants

applied for by respondent and awarded to the University. The first grant was awarded to the University from the Japan Foundation. The grant was subsequently refused by the University. Respondent contends the University refused the grant as part of its retaliation against respondent. The University contends the grant was refused as it was in the midst of reorganizing its liberal arts department and that it could not properly administer the grant.

The second grant was awarded to the university by the Board of Regents to develop a "Historical Cartography Project" and was used to purchase computer equipment. Respondent contends the university denied him the space and network access needed to implement the project.

Supervisory Jurisdiction

Initially this Court must determine whether the exercise of its supervisory jurisdiction is appropriate. Ordinarily, an appellate court will not exercise its supervisory jurisdiction absent a showing of irreparable injury or unless an ordinary appeal does not afford an adequate remedy.

Herlitz Construction Co. v. Hotel Investors of New Iberia, Inc., 396 So.2d 878 (La.1981); *State Farm General Insurance Company v. Fink*, 99-1833 (La. App. 4 Cir. 12/29/99), 751 So.2d 335. Furthermore, relator does not suggest that the legal issue that is the subject of the application is the sole

point hindering compromise of the litigation. *See Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So.2d 1234, 1241 (La. 1993).

We find that the exercise of this court's supervisory jurisdiction is appropriate in this instance as the trial court's decision allowing respondent to go forward with the cause of action for tortious interference of contract is the type of significant departure from established law that warrants this court's supervisory jurisdiction. As discussed herein, there is a strong showing that respondent cannot establish a cause of action for tortious interference with contract. However, we note that the Supreme Court has indicated a preference for the denial of partial summary judgments when "there are two or more items of damages or theories of recovery which arise out of the operative facts ...," saying that "[i]n such a case, there is truly only one cause of action, and a judgment partially maintaining the exception is generally inappropriate." *Id.* at 1239.

We note that the factual basis for the allegations of tortious interference with the two grants is likely still relevant with respect to respondent's retaliation claim.

Merits

In *9 to 5 Fashions, Inc. v. Spurney*, 528 So.2d 228 (La. 1989) the

Louisiana Supreme Court for the first time recognized that a very narrow cause of action against a corporate officer can be maintained for tortious interference with contract. In *Spurney*, the Louisiana World Exhibition, Inc. (LWE), contracted with 9 to 5 Fashions to supply uniforms for the fair employees. After the fair, 9 to 5 was unable to collect under the contract, because LWE was in bankruptcy. 9 to 5 sued Spurney, CEO of LWE, alleging that he had damaged 9 to 5 by intentional and negligent interference that hindered its performance of the contract. Referring to La. Civil Code article 2315, the court stated that a corporate officer owes an obligation to one having a contractual relationship with the corporation not to commit acts intentionally which caused the corporation to breach the contract or to make performance more difficult or burdensome unless the officer had "reasonable justification" for his actions.

The court identified the elements of this cause of action as:

- (1) The existence of a contract or a legally protected interest between the plaintiff and the corporation;
- (2) The corporate officer's knowledge of the contract;
- (3) The officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome;

(4) Absence of justification on the part of the officer; [and]

(5) Causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

Id. at 234.

Relators contend that respondent cannot state a cause of action because he is not a party to the contracts in question, and that the grant contracts are between the university and the institutions. Respondent does not contend otherwise but argues that *Spurney* should be expanded to include a cause of action for third party beneficiaries. Relators contend that respondent does not qualify as a third party beneficiary of the grant contracts at issue herein noting that the fact that a third party derives a benefit from a contract does not render the contract *pour autrui*. *City of Shreveport v. Gulf Oil Corp.*, 431 F.Supp. 1 (W.D. La. 1975), aff'd 551 F.2d 93 (5th Cir. 1977).

The requirements to be met in order to establish that one is a third-party beneficiary of a contract were set forth by this court in *Concept Design, Inc. v. J.J. Krebs & Sons, Inc.*, 96-1295 (La.App. 4 Cir.3/19/97), 692 So.2d 1203, as follows:

Under Louisiana law, a contract for the benefit of a third party is referred to as a *stipulation pour autrui*. See, e.g. *Whitney National Bank v. Howard Weil Financial Corp.*, 93-CA-1568 (La. App. 4th Cir.1/27/94), 631 So.2d 1308, 1310 ... "In order to establish a *stipulation pour autrui* there must be a clear expression of

intent to benefit the third party. The third party relationship must form the consideration for a condition of the contract; the benefit may not be merely incidental to the contract." *State, In re Adoption of S.R.P.*, 555 So.2d 612, 618 (La. App. 4th Cir.1989), *writ denied*, 556 So.2d 1288 (La.1990). A contract, in order to constitute a *stipulation pour autrui*, must be "in writing and clearly manifest an intention to confer a benefit upon a third party". *DePaul Hospital v. Mutual Life Ins. Co.*, 487 So.2d 143, 146 (La. App. 4th Cir.1986). (footnote omitted)

96-1295 at p. 5, 692 So.2d at 1205-1206.

Moreover, the third party relationship must form the consideration for a condition of the contract. As enunciated in the jurisprudence, the factors to consider are:

(1) The existence of a legal relationship between the promisee and the third person involving an obligation owed by the promisee to the beneficiary which performance of the promise will discharge;

(2) The existence of a factual relationship between the promisee and the third person, where (a) there is a possibility of future liability either personal or real on the part of the promisee to the beneficiary against which performance of the ... [promisor] will protect the former; (b) securing an advantage for the third person may beneficially affect the promisee in a material way; (c) there are ties of kinship or other circumstances indicating that a benefit by way of gratuity was intended. J. Denson Smith, Third Party

Beneficiaries in Louisiana: *The Stipulation Pour Autrui*, 11 Tul.L.Rev. 18, 58 (1936), quoted in, *Dartez v. Dixon*, 502 So.2d 1063, 1065 (La.1987); *Andrepoint v. Acadia Drilling Co., Inc.*, 255 La. 347, 358, 231 So.2d 347, 351 (1969); *Tallo v. Stroh Brewery Company*, 544 So.2d 452, 454 (La.App. 4 Cir.1989); *Gardner v. Zulu Social Aid and Pleasure Club, Inc.*, 98-1040 (La.App. 4 Cir. 2/10/99) 729 So.2d 675, 680.

Respondent contends that because the grant contract with the Japan Foundation designates Dr. Lazzerini as the project director it reflects an intent to confer a benefit upon him. The grant states that the "Project Director' should be the official in the applying institution who is responsible for the actual control and conduct of the Japanese-language program with which [the] grant is concerned." With respect to the Board of Regents grant, respondent contends that he was the intended beneficiary under the grant because the University agreed to furnish the services of respondent as the "Principal Investigator."

Although Dr. Lazzerini no doubt would have garnered some form of benefit from the grants, either tangible or intangible, the grants themselves do not clearly specify in writing a benefit to respondent. The grants simply designates Dr. Lazzerini as either the "Project Director" or "Principal Investigator."

Respondent does not identify what obligation the University owed to him for which the grants were made to discharge. The present facts do not suggest that respondent can assert a third party beneficiary status. Although advantageous to respondent, the grants do not create in him an actionable right.

Finally, respondent does not suggest how as an employee of the University, he could also be considered a third party beneficiary. Such a construction would as a practical matter confer the same status and rights as third party beneficiary upon on an employee who is responsible in his duties to the entity for some aspect of the performance of a contract or who derives some benefit from the existence of the contract. For instance, any time a contract designated an account manager, he could claim third party beneficiary status. Dr. Lazzerini as an employee of the University is essentially the same entity as the University, not a third party.

Whether *9 to 5 Fashions v. Spurney, supra* should be expanded to include actions by third party beneficiaries is not an appropriate question in the present circumstance as respondent cannot establish that he is a third party beneficiary. The trial court erred in denying the motion for partial summary judgment.

Relator further contends that from a factual basis respondent

failed to demonstrate in response to the motion for summary judgment that he could establish that relators' actions were not justified. The argument is moot in light of the fact that respondent cannot establish a cause of action, even assuming that his allegations are true.

For the foregoing reasons, we find necessary the exercise of our supervisory jurisdiction and we grant the relators' motion for partial summary judgment.

APPLICATION FOR SUPERVISORY WRIT GRANTED.
JUDGMENT ON PARTIAL SUMMARY JUDGMENT REVERSED.